

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERTA ELMORE,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF
CORRECTIONS, WASHINGTON,
CORRECTIONS CENTER FOR
WOMEN, DR. STEVEN HAMMOND,
Chief Medical Officer, KENNETH
TAYLOR, Director of Health, DOC, JEFF
PERRY, Healthcare Manager, Dr. Colter,
staff physician, and ARNP PAM SAARI,

Defendants.

CASE NO. 13-5946 RJB JRC

ORDER ON REPORT AND
RECOMMENDATION AND OTHER
MOTIONS

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge J. Richard Creatura (Dkt. 33), the parties' objections to the Report and Recommendation (Dkts. 37 and 38), Plaintiff's Motion to Amend her Complaint (Dkt. 35), Plaintiff's Motion for a Continuance and the Court Consider Additional Evidence and Response

1 to Summary Judgment in De Novo Review (Dkt. 36). The Court has considered the pleadings
2 filed in support of and in opposition to the motions and the file herein.

3 Plaintiff, *pro se*, filed this case on October 28, 2013, asserting that her Eighth
4 Amendment right against cruel and unusual punishment was violated in connection with medical
5 care she received as a prisoner at the Washington Correction Center for Women (“WCCW”).
6 Dkts. 1 and 6. Plaintiff’s Complaint alleges she was denied access to a handicap cell. *Id.*

7 After consideration of the Report and Recommendation, the parties’ Objections to the
8 Report and Recommendation, the additional evidence and argument offered by Plaintiff, the
9 Report and Recommendation should be adopted for the reasons stated below, except for the
10 recommendation to dismiss Plaintiff’s Eighth Amendment claims related to pain relief. The case
11 should be re-referred to Magistrate Judge Creatura for a supplemental report and
12 recommendation and for further proceedings. Plaintiff’s motion to Amend her Complaint should
13 be granted, except to the extent that her Amended Complaint asserts claims dismissed by this
14 order.

15 I. FACTS

16 The background facts are stated in the Report and Recommendation (Dkt. 33, at 1-9) and are
17 adopted here.

18 On April 13, 2015, the Report and Recommendation was issued, recommending the
19 Defendant’s motion to summarily dismiss Plaintiff’s case be granted, in part, and denied, in part.
20 Dkt. 33. On April 27, 2015, attorney Jean M. Schiedler-Brown appeared for Plaintiff. Dkt. 34.
21 Plaintiff, though counsel, then filed her Objections to the Report and Recommendation (Dkt. 37),
22 the Motion to Amend her Complaint (Dkt. 35) and her Motion for Continuance and for the Court
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1 [to] Consider Additional Evidence and Response to Summary Judgment (Dkt. 36). Defendants
2 also filed objections to the Report and Recommendation. Dkt. 38.

3 **II. DISCUSSION**

4 **A. REPORT AND RECOMMENDATION**

5 Pursuant to Fed. R. Civ. P. 72(b)(3), if parties object to a magistrate judge's recommended
6 disposition of a case, as they have here, the "district judge may accept, reject, or modify the
7 recommended disposition, receive further evidence, or return the matter to the magistrate judge
8 with instructions."

9 The Report and Recommendation should be adopted, except as to the Eighth Amendment
10 claim against the individual defendants for deliberate indifference to Plaintiff's serious medical
11 needs for failure to provide Plaintiff with proper pain medication. The case should be re-referred
12 to the magistrate judge for a supplemental report and recommendation on that claim.

13 Although it was difficult to ascertain which claims Plaintiff was making in her original
14 complaint, the Report and Recommendation's recommendations address Plaintiff's § 1983
15 claims and federal disability access related claims. In light of the difficulty in determining the
16 nature of Plaintiff's claims from the complaint and Plaintiff's later pleadings, this approach was
17 reasonable.

18 The Report and Recommendation recommends dismissal of all claims except federal claims
19 for violation of Section 504 of the Rehabilitation Act ("Rehabilitation Act") and Title II of the
20 Americans with Disabilities Act ("ADA") against the Washington Department of Corrections
21 and the WCCW. The recommended dismissal of other claims is pursuant to Eleventh
22 Amendment immunity. Dkt. 33.

1 This recommendation is appropriate for the reasons provided in the Report and
2 Recommendation, and the recommendation should be adopted. Plaintiff objects, arguing that her
3 state law claims should proceed against the state. This objection is without merit. Defendants
4 have shown that the Washington Department of Corrections and WCCW are immune from all
5 claims except the federal claims for violation of the Rehabilitation Act and ADA.

6 The Report and Recommendation recommends the following dispositions of Plaintiff's
7 Eighth Amendment claims against the individual defendants for deliberate indifference to her
8 serious medical needs: (a) for delay in diagnosis, dismissal of all defendants, (b) for failure to
9 provide her with proper pain medication, dismissal of all defendants, (c) for Defendants
10 Hammond's and Taylor's denial of an orthopedic referral, dismissal, (d) for denial of a
11 wheelchair, sit-down walker, mechanical aids, inmate helpers and arch supports be dismissal as
12 to defendant Colter, but not dismissed as to defendants Saari and Perry, and (e) for denial of a
13 handicap accessible room, not dismissed as to defendants Saari and Perry. Dkt. 33. The Report
14 and Recommendation recommends denial of the individual defendants' motion for qualified
15 immunity on the surviving claims. *Id.*

16 The Report and Recommendation also found that Plaintiff's ADA and Rehabilitation
17 claims for denial of a wheelchair, sit-down walker, mechanical aids, inmate helpers, arch
18 supports and a handicap accessible cell should not be dismissed as to individual defendants Saari
19 and Perry. Dkt. 33.

20 Defendants object to the Report and Recommendation, arguing that some of the evidence
21 relied upon was inadmissible, but make no showing that any portion of the Report and
22 Recommendation should not be adopted as a result. Dkt. 38. They argue that Defendants were
23 not on notice regarding Plaintiff's ADA or Rehabilitation Act claims, but a fair reading of her
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1 complaint and later pleadings do not foreclose such a claim. Further, they complain that there
2 was no allegation of a delay in diagnosis claim, so the Report and Recommendation should not
3 have addressed the claim or recommended denial of the claim. That objection does not provide a
4 basis to reject the Report and Recommendation. Defendants reiterate their prior arguments
5 regarding dismissal of the Eighth Amendment, ADA and Rehabilitation claims asserted against
6 individual defendants Perry and Saari. Those arguments are addressed in the Report and
7 Recommendation. They do not provide a basis to reject the Report and Recommendation.

8 It is not necessary to address Plaintiff's arguments in her supplemental response (Dkt. 36-
9 3) or Plaintiff's objections (Dkt. 37) which offer further argument and support for claims that
10 were not recommended for dismissal by the Report and Recommendation. To the extent that
11 many of her objections and argument in her supplemental response relate to new claims asserted
12 in her Amended Complaint, they do not provide a basis for rejecting the Report and
13 Recommendation.

14 In her objections, Plaintiff argues that her 8th Amendment claim for failure to provide her
15 with proper pain medication should not be dismissed. Dkt. 37. She submits extensive briefing
16 and additional evidence in support of this claim. Dkts. 36-3, 36-5, 36-6, 36-7, and 36-8. The
17 case should be re-referred to Magistrate Judge Creatura for a supplemental report and
18 recommendation on this claim.

19 The Report and Recommendation (Dkt. 33) should be adopted, except for the
20 recommendation regarding the Eighth Amendment claim for failure to provide Plaintiff with
21 proper pain medication. The case should be re-referred to Magistrate Judge Creatura for a
22 supplemental report and recommendation on this claim (and any other claim that has not been
23 addressed and arises hereafter) and for further proceedings related to that supplemental report.

B. MOTION TO AMEND

Under Fed. R. Civ. P. 15(a)(2), “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” In determining whether leave to amend is appropriate, the district court considers the presence of four factors: futility, bad faith, undue delay, and/or prejudice to the opposing party. *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)(*internal citations omitted*).

Plaintiff’s Motion to Amend her Complaint (Dkt. 35) should be granted, in part. Plaintiff’s Amended Complaint makes claims against all defendants for (1) negligence, (2) violation of the Washington State Law Against Discrimination (“WLAD”), (3) retaliation related to WLAD, (4) violation of Section 504 of the Rehabilitation Act, (5) violation of the Americans with Disabilities Act, (6) violation of the Fourteenth and Eighth Amendments pursuant to 42 U.S.C. § 1983. Dkt. 36-2, at 30.

There is no showing that the proposed amendments are futile, except to the extent that it makes claims that this order dismisses. There is no showing that the motion to amend was made in bad faith. Plaintiff did not unduly delay in making her motion. The amendments clarify Plaintiff’s claims. Defendant has not shown that it will be prejudiced by the proposed amendments. The motion to amend should be granted, in part, to the extent that the newly asserted claims are not dismissed by this order.

C. PLAINTIFF’S MOTIONS FOR CONTINUANCE AND FOR CONSIDERATION OF ADDITIONAL EVIDENCE AND ARGUMENT

Plaintiff, through counsel, moves the Court for a six month continuance of the case schedule, in order to conduct discovery, and respond to defendants’ motion for summary

1 judgment. Dkt. 36. Plaintiff points out that although she has been deposed, she has not had an
 2 opportunity to depose any of the defendants. *Id.* Plaintiff argues that she did not have the ability
 3 or expertise to properly conduct discovery or respond to Defendant's motion before she was
 4 represented by counsel.

5 Plaintiff's motion for extension of time to conduct discovery and respond to the
 6 Defendants' motion for summary dismissal should re-referred to Judge Creatura.

7 **III. ORDER**

8 Therefore, it is hereby **ORDERED** that:

- 9 • The Report and Recommendation (Dkt. 33) is **ADOPTED** as to the all claims,
 10 except for the recommendation regarding the Eighth Amendment claim for
 11 failure to provide Plaintiff with proper pain medication. The case should be **RE-**
 12 **REFERRED** to Magistrate Judge Creatura for a supplemental report and
 13 recommendation on this claim (and any other claim that has not been addressed
 14 or that arises hereafter) and for further proceedings related to that supplemental
 15 report.
- 16 • Plaintiff's Motion to Amend her Complaint (Dkt. 35) **IS GRANTED**, except as
 17 to those claims which are dismissed by this order; and
- 18 • Plaintiff's Motion for a Continuance and the Court Consider Additional Evidence
 19 and Response to Summary Judgment in De Novo Review (Dkt. 36) is
 20 **REFERRED** to Magistrate Judge Creatura.

21 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
 22 to any party appearing *pro se* at said party's last known address.
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1 Dated this 28th day of May, 2015.

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4 ROBERT J. BRYAN
United States District Judge